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IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1952. No.

CHARLES E. WHITE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Charles E. White respectfully represents:

SUMMARY STATEMENT OF THE FACTS.

We are **not** here raising factual questions. The Commissioner of Internal Revenue made a determination of the petitioner's income tax liability (plus fraud penalty) and

issued a statutory notice of deficiency *without examination of the taxpayer's books and records*, and *without attempting to verify petitioner's income from the sources of income.* We **rely** on the finding of fact by the Tax Court:

> "During the taxable years he operated a restaurant and bar or taproom known as Edgmont Beer Garden, in Chester. He also bought, sold, and rented real property; loaned money on mortgages; and furnished bail for persons arrested" (153a).

Further, the Tax Court found that petitioner earned, and reported in his income tax returns, a gross profit as high as 105% from his taproom business;—and his other sources of income can be checked from independent records (154a).

The Commissioner made no audit before he made his determination of deficiency. His Internal Revenue Agent testified (107a):

> "Q. You made a thorough examination of these four years did you not?
>
> "A. We made investigation to determine the net worth of the taxpayer."

The petition to the Tax Court for re-determination of the tax pleaded the keeping of books, records, and the fact of all the above named sources of income. The Commissioner's answer was a general denial, and the additional averment of allegations of new matter—the alleged net worth of the

petitioner as of December 31st of each of the following years (14a, *et seq.*):

1941	1942	1943	1944	1945
8,154.24	14,526.08	37,610.23	66,613.40	77,913.25[1]

The taxpayer's *sworn reply* to the new matter averred his net worth for the same years as follows (25a *et seq.*):

23,870.46	25,657.72	29,552.59	40,553.08	46,126.57

Years **after** the Commissioner had made his determination, in fact shortly before trial in the Tax Court, the Commissioner examined the taxpayer's business books and found them to be "substantially correct" (108a).

There is no evidence of any fraud, civil or criminal, or any suggestion as to where or how the taxpayer could have made any other income.

The tax Court sustained the Commissioner[2] and the Court of Appeals for the Third Circuit affirmed, stating the issues were of fact.

JURISDICTION.

The judgment of the Court of Appeals for the Third Circuit was filed May 16, 1952. The jurisdiction of your Honorable Court is invoked under the Act of June 25, 1948, Chapter 646, 62 Stat. 928 (28 U. S. C. A. 1254).

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[1] The Commissioner's figures give no credit for any currency whatsoever on hand at the beginning, and include mortgages **at face value although payments on account of principal had been made during the years and affidavits of the mortgagors showing the correct balances had been given to the agents** even **prior to the deficiency notice** (132a). Do we have wholesale perjury and wholesale false statements violating 18 U.S.C.A. 1001? Or is the Commissioner committing the **fraud?**

[2] The petitioner moved the Tax Court for a rehearing, offering **"to prove his actual income** by showing that his restaurant and bar profit is equal to or greater than others in the same business, and all his other sources of income by the leases and tenants of his real estate, the mortgages and mortgagors, and the persons for whom **he entered bail."** The motion was denied.

QUESTIONS PRESENTED.

1. Whether, before making a statutory determination of a taxpayer's income, the Commissioner of Internal Revenue must first examine the books and records of the taxpayer, all sources of income being known and readily verifiable; or can the Commissioner disregard books, records and sources of income, and without any audit of income, arbitrarily purport to determine income by the net worth method?

2. Where the Court finds as a fact that income from all sources is reported, and does not find that any income from any particular source has been understated, is it possible for it to conclude that fraud has been committed?

3. Whether the Commissioner has the burden of proving his averments of new matter, to which a verified reply has been made.

REASONS FOR GRANTING THE WRIT.

1. The decision of the Tax Court, affirmed by the Court of Appeals for the Third Circuit, is in conflict with all decided cases holding that the use of the net worth method of determining net income is an arbitrary abuse of governmental power unless the Commissioner shows that the taxpayer's income cannot be independently checked or verified: *O'Dwyer v. Commissioner,* 110 F. 2d 925 (5 Cir. 1940), where the taxpayers were professional gamblers; *Kenney*

v. Commissioner, 111 F. 2d 374 (5 Cir. 1940), another gambler; *Carmack v. Commissioner*, 183 F. 2d 1 (5 Cir. 1950), a poker expert whose winnings could not be checked; and *Halle v. Commissionr*, 175 F. 2d 500 (2 Cir. 1949), cited by the Tax Court, a lawyer "lucrative was his practice while the Volstead Act * * * was in effect."

2. The Commissioner's determination, made without checking taxpayer's books or sources of income, was arbitrary.

3. The practice of the Commissioner of determining income by the net worth method is of great national interest, and suggests delimitation of the Commissioner's methods by your Honorable Court.

Wherefore your petitioner prays that a writ of certiorari issue *sec. leg. et sec. reg.*

CHARLES E. WHITE,
Petitioner.
By: HENRY D. O'CONNOR,
Attorney for Petitioner.

PETITIONER'S BRIEF.

To refute the suggestion that the issue raised here is factual, attention is respectfully called to the fact that the greater portion of the petitioner's brief in the Circuit Court is devoted to the question:

> "Where all sources of a taxpayer's income can be verified to determine the correct amount of that income, can the Commissioner determine income by the 'net worth' method?"

When the Commissioner's Agents *first visited* the taxpayer, he stated he had cash on hand[3]; so they never examined his books or checked his sources of income but put him on the net worth basis and *forthwith* issued a statutory notice of deficiency. It is this utter failure to make any attempt to audit, check, or verify this taxpayer's books and income from the sources of income *prior to the determination of a deficiency* which was argued at length in the Tax Court and in the Court below. Both Courts ignored the argument.

Yet the following statement was made in the *Commissioner's* Brief in the Circuit Court at page 21:

> "As the taxpayer states in respect of taxpayers in other like or similar cases—*Mazzacone v. Commissioner*, and *Carmack v. Commissioner, supra*, for example—(Br. 20), 'Circumstantial evidence had to be relied on because their sources of income in the taxable years *could not be independently checked*,' as here."

I can ask but one greater compliment than the direct quotation of my argument with approval by my learned opponent, —the use of the same quotation by a court deciding in favor of my client.

The whole point in this case is that the Commissioner made no attempt to independently check the taxpayer's income or his books and records *before* he made his determination of deficiency and issued a statutory notice or 90 day letter.

For that matter, if a taxpayer has books as high as the Washington Monument, their accuracy must be checked by the auditor with the sources of income. There is no magic in books themselves. Their *correctness* must be tested.

Now let us look at the *Louis Halle* case, 7 T. C. 245, affirmed 175 F. 2d 500, the only case cited by the Tax Court. In that case, *before the Commissioner made a determination,*

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[3] The Tax Court commented on the fact that the petitioner's wife, who testified, was not asked about the existence of this cash. The taxpayer has had five (5) wives. The Commissioner had one ex-wife at the hearing, but did not call her as a witness.

he examined a book kept from 1934 on by Mr. Halle. The years 1929 to 1938 were involved. The Tax Court there wrote in its opinion:

> "The Commissioner examined it and all other data submitted by the petitioner but, *with reason*, was not satisfied" (emphasis supplied).

The Court of Appeals wrote in the *Halle* case:

> "The Commissioner determined the taxpayer's income during the years here involved from the bank-books and brokerage accounts of taxpayer and his wife, cancelled checks, check stubs and vouchers, and such other meager records and data as were available. * * * No reasonable doubts were resolved against the taxpayer, while the audit and analysis made by the Commissioner seems to have been *as accurate as the circumstances here permitted*" (emphasis supplied).

The Commissioner did all this in the *Halle* case **before** he made his determination of income tax deficiency and issued a statutory notice. The *Halle* case supports the petitioner.

Do not be misled by the language of the Opinion of the Tax Court into inferring that any audit of the taxpayer's books was made, or that his sources of income found as a fact by the Tax Court, were checked **before** the Commissioner made his determination. The books were not looked at until two years after the determination; about two weeks before the hearing in the Tax Court (in the language of the Commissioner's counsel, "* * * in connection with our getting ready for this trial" (108a). It then became important to attempt to find something wrong with the books, however petty, to justify the arbitrary determination. Fundamentally the books are correct (also p. 108a). *Under all the cases*, the examination of the books was too late. Nor is there any finding by the Tax Court that the Commissioner made any effort to check the taxpayer's income *before* he

made his deficiency determination and issued a 90 day letter. There could be no such finding, for it is not a fact.

Since no reason why the Commissioner used the net worth method is suggested or found as a fact, under the cases the determination is arbitrary. Under the cases, where books and records are kept, *the net worth method is out.* The Tax Court found as a fact that all tap room licensees in Pennsylvania must *keep books showing business receipts and disbursements;* further, that his profits amounted to as much as 105% gross. It would have been against the law as the Tax Court found it to be, for him to put rents and mortgage interest in these books; and rents and mortgage *investments are not his* **business** *and can be readily verified.* Then there is the final source of income, the bail bonds which taxpayer entered as an accommodation for his customers. The Tax Court found as a fact that in 1945 he entered bail totalling $44,300 and that he reported income from bail fees of $2,157. Taxpayer testified the **most** he ever received was 10% and other times entered bail for nothing. I do not know what they charge for bail in Washington, but you could get all you want in Pennsylvania for 10%; in fact the state law now limits bondsmen to 8%. The Commissioner could ask these people how much they paid the taxpayer for bail; and, while this was not the taxpayer's *business,* the Commissioner could charge the 5% negligence penalty for extra work.

All criticism of the taxpayer's books was made long after the deficiency determination, at the Tax Court hearing, by cross-examination of the taxpayer after the books were offered in evidence. The Tax Court mentions a gas and electric bill paid out of the till and entered on the books. That amounted to $10.15; *but was not deducted as a business expense,* although one might get that idea from the Tax Court's opinion—not in so many words.

We reiterate, the books of the taxpayer were never checked *prior* to the determination of the deficiency by the Commissioner, nor was any reason suggested why his in-

come was not independently checked *regardless of the books. All comments on the books in the Tax Court's opinion are based on cross-examination at the hearing,* **years after** the deficiency was determined by the Commissioner, to cover up the arbitrary determination made in the first place. The result is a revolution in Tax Court procedure, and hereafter a taxpayer will have to come before the Tax Court prepared to prove his income regardless of his books, all of which is contrary to the holding of your Honorable Court in *Helvering v. Taylor,* 55 S. Ct. 287:

> "We find nothing in the statutes, the rules of the Board or our decisions that gives any support to the idea that the Commissioner's determination shown to be without rational foundation and excessive will be enforced unless the taxpayer proves he owes nothing, or, if liable at all, shows the correct amount."

Respectfully submitted,

HENRY D. O'CONNOR,
Attorney for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 254

CHARLES E. WHITE, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 153-168) are not officially reported. The *per curiam* opinion of the Court of Appeals (R. 170) is reported in 196 F. 2d 728.

JURISDICTION

The judgment of the Court of Appeals was entered on May 16, 1952. (R. 171.) The petition for a writ of certiorari was filed on August 5, 1952. The

jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Whether there is error in the Tax Court's findings and decision, affirmed by the court below, upholding the deficiencies in income taxes and the imposition of the 50% fraud penalties thereon under Section 293 (b) of the Internal Revenue Code, as asserted against the taxpayer by the Commissioner for each of the taxable years 1942 to 1945, inclusive.

STATUTE INVOLVED

The pertinent statutory provisions are printed in the Appendix, *infra*, pp. 8-10.

STATEMENT

The pertinent facts, as found by the Tax Court, may be summarized as follows (R. 153-163):

The taxpayer is a resident of Chester, Pennsylvania. During the taxable years 1942 through 1945 he there operated a restaurant and bar in Chester. He also bought, sold and rented real property, loaned money on mortgages, and furnished bail for persons arrested. (R. 153.)

The taxpayer's records showed the receipts, expenses and profits from the operation of the restaurant and bar business. (R. 154.) The taxpayer admitted that his 1943 tax return understated the bar income by $4,995, and he was unable to explain this discrepancy. (R. 163.) His records do not show his income from other sources, nor do

they show his assets or liabilities as of any given date. (R. 154.) The taxpayer's tax returns for the taxable years 1942 through 1945, here involved, showed net incomes, respectively, of $4,024.79, $5,427,97, $13,870.81 and $14,035.03. (R. 156-157.)

The Commissioner determined taxpayer's net income and tax liability for the years 1942 through 1945 by the "net worth" method and asserted deficiences and fraud penalties accordingly. (R. 163.) At the hearing in the Tax Court the Commissioner introduced computations showing taxpayer's net worth, as ascertained by the Commissioner's investigation, at the end of 1941 and at the end of each of the taxable years involved. (R. 160, 163.) In computing the annual increase in taxpayer's net worth, and the net taxable increase, the Commissioner added to the net worth otherwise determined $4,000 per year as representing taxpayer's living expenses, and also the income taxes paid by him. (R. 160-162.) The taxpayer conceded that the computations of the assets were substantially correct, except in four particulars, namely, that (1) they did not show $15,000 in cash given taxpayer by his father before 1942; (2) they did not show $10,000 in cash accumulated by taxpayer prior to 1942; (3) they showed loans secured by mortgages at their face amount instead of showing the amount of principal due at the respective dates; and (4) they showed cash bail on deposit according to the record of the clerk of the court where it was deposited, whereas taxpayer argued that the full amount stated may not have been actually depos-

ited. (R. 163-164.) The taxpayer also urged that the estimate of his living expenses in the taxable years was too high. (R. 164.)

The Tax Court held, contrary to taxpayer's contention, that the records of taxpayer being incomplete and inaccurate, at least in some particulars, resort could properly be had to the net worth method of computing income. (R. 163.) It discussed in detail each of the taxpayer's objections with respect to the accuracy of the computations of taxpayer's net worth and resolved each of these objections against taxpayer. (R. 163, 164-167.) Finally, the Tax Court found that the Commissioner had sustained his burden to prove fraud. (R. 167-168.)

The court below affirmed in a brief *per curiam* opinion, holding (R. 170) that the findings of fact of the Tax Court are supported by the evidence; that the findings support the Commissioner's determinations both as to deficiencies in tax and fraud penalties; and that the Tax Court did not err in concluding, on the facts of this case, that resort could be had by the Commissioner to the net worth method of determining taxpayer's income.

ARGUMENT

This case presents only factual issues not warranting review by the Court. While petitioner contends there was error in the use of the net worth method of reconstructing taxable income, the decision below in that respect is in conformity with a wealth of authority and is in conflict with no other decision.

Resort by the Commissioner to the net worth method of reconstructing income was had in the present case only after two unsuccessful attempts to have the taxpayer turn over to investigating internal revenue agents his books and records. In April 1947, two agents of the Treasury Department visited taxpayer's place of business for the purpose of investigating his tax returns. They asked to see the taxpayer's books and records, but the taxpayer requested them to postpone their examination until the return of his accountant, who was then in Florida on a two weeks' vacation. This the agents agreed to. (R. 99-100.) On May 5, 1947, one of the agents and a deputy collector went to the taxpayer's place of business and asked him for his records several times. The taxpayer said that he did not know anything about records, and that if he did he would not give them to the agents. (R. 110-111.) After this second visit, the Treasury officials proceeded to build up the taxpayer's income on a net worth basis. (R. 101.) The net worth statement prepared by the Commissioner was introduced and admitted in evidence at the Tax Court hearing (R. 103, 105,) and was agreed to by the taxpayer except as to certain specified items mentioned above (R. 103-105.)

Thus the record flatly contradicts the taxpayer's factual premise (Br. 5, 6) that the Commissioner made no attempt independently to check the taxpayer's income or his books and records before making the deficiency determinations for the taxable years involved. Moreover, the Tax Court has

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found in this case that such records as the taxpayer kept were inaccurate at least in some particulars, and were incomplete in that they totally failed to show the taxpayer's income from sources other than the bar and restaurant business. (R. 154, 163.) The courts have uniformly held that in such circumstances income may be reconstructed and determined by the net worth method of computation. *Pottash Brothers* v. *Commissioner,* 12 B.T.A. 190, modified and affirmed, 50 F. 2d 317, 320-321 (C.A.D.C.); *Katz* v. *Commissioner,* 188 F. 2d 957 (C.A.2d); *Mazzacone* v. *Commissioner,* decided May 20, 1948 (1948 P-H T.C. Memorandum Decisions, par. 48,084), affirmed *per curiam,* 175 F. 2d 778 (C.A. 3d); *Dawley* v. *United States,* 186 F. 2d 978 (C.A.4th); *Carmack* v. *Commissioner,* 183 F. 2d 1 (C.A.5th), certiorari denied, 340 U. S. 875; *Gariepy* v. *United States,* 189 F. 2d 459 (C.A.6th); *United States* v. *Hornstein,* 176 F. 2d 217 (C.A.-7th); *Gleckman* v. *United States,* 80 F. 2d 394 (C.-A.8th); *Barcott* v. *United States,* 169 F. 2d 929, 932 (C.A.9th), certiorari denied, 336 U.S. 912; *Cohen* v. *Commissioner,* 176 F. 2d 394 (C.A. 10th). The cases cited by the taxpayer (Pet. 4-5) are not to the contrary.

Helvering v. *Taylor,* 293 U. S. 507, relied on by the taxpayer (Br. 9,) does not support his position. There the evidence had established that the Commissioner's determination of income was arbitrary and excessive but did not show the correct income and tax liability. This Court held that remand to the Board of Tax Appeals for the taking

of additional evidence as to the correct tax liability, was proper. In the present case the Commissioner's determination of the deficiencies and fraud penalties was clearly not arbitrary and excessive. On the contrary, the taxpayer wholly failed to show that the Commissioner's determination of income was excessive, as both courts below held. (R. 163-168, 170).

CONCLUSION

The decision of the court below is correct, turns on the particular facts of this case, and presents no conflict. The petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT L. STERN,
Acting Solicitor General.
ELLIS N. SLACK
Acting Assistant Attorney General.
LEE A. JACKSON,
S. DEE HANSON,
Special Assistants to the Attorney General.

SEPTEMBER, 1952.

APPENDIX

Internal Revenue Code:

SEC. 21. NET INCOME.

(a) *Definition.*—"Net income" means the gross income computed under section 22, less the deductions allowed by section 23.

* * * * *

(26 U.S.C. 1946 ed., Sec. 21.)

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * *, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * * *

(26 U.S.C. 1946 ed., Sec. 22.)

SEC. 41. GENERAL RULE.

The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method

of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year.
(26 U.S.C. 1946 ed., Sec. 41.)

SEC. 42. PERIOD IN WHICH ITEMS OF GROSS INCOME INCLUDED.

(a) [As amended by Sec. 114 of the Revenue Act of 1941, c. 412, 55 Stat. 687] *General Rule.*—The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period. * * *

* * * * *

(26 U.S.C. 1946 ed., Sec. 42.)

SEC. 43. PERIOD FOR WHICH DEDUCTIONS AND CREDITS TAKEN.

The deductions and credits (other than the corporation dividends paid credit provided in section 27) provided for in this chapter shall be taken for the taxable year in which "paid or accrued" or "paid or incurred", dependent upon the method of accounting upon the basis of which the net income is computed, unless in

order to clearly reflect the income the deductions or credits should be taken as of a different period. * * *
(26 U.S.C. 1946 ed., Sec. 43.)

SEC. 54. RECORDS AND SPECIAL RETURNS.

(a) *By Taxpayer.*—Every person liable to any tax imposed by this chapter or for the collection thereof, shall keep such records, render under oath such statements, make such returns, and comply with such rules and regulations, as the Commissioner, with the approval of the Secretary, may from time to time prescribe.
(26 U.S.C. 1946 ed., Sec. 54.)

SEC. 293. ADDITIONS TO THE TAX IN CASE OF DEFICIENCY.

* * * * *

(b) *Fraud.*—If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected, and paid, in lieu of the 50 per centum addition to the tax provided in section 3612 (d) (2).
(26 U.S.C. 1946 ed., Sec. 293.)

SEC. 1112. BURDEN OF PROOF IN FRAUD CASES.

In any proceeding involving the issue whether the petitioner has been guilty of fraud with intent to evade tax, the burden of proof in respect of such issue shall be upon the Commissioner.
(26 U.S.C. 1946 ed., Sec. 1112.)

☆ U. S. GOVERNMENT PRINTING OFFICE: 1952 221783 321

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Certain statements in the Brief for the Respondent should not go unanswered; hence this Reply Brief.

Reply to Statement.

The taxpayer does **not** concede that of the four years involved, the 1943 return understates income by $4,995. It was brought out *at the trial* that the *gross* sales in the books for that year were $64,991.26. The figure in the return is $59,996.26.

The **official instructions** for the preparation of tax returns issued by the Commissioner read:

> "Total Receipts. You should include all income derived from your trade or business. *In determining the amount to be entered as total receipts, you should subtract* from your total income such items as cost of returned goods, rebates and allowances from the sales price or service charge." (Emphasis supplied.)

For example, I have before me a notice to the stockholders of the American Snuff Company. It shows sales of a company in amount of $2,700,000, and deducts $500,000 revenue stamps to arrive at the figure of *net* sales. While I do not know what the difference of $4,995 is (the Tax Court still has the books), Mr. White thinks it may be the floor tax he paid in that year.

It is a fact that these books were never audited by the Commissioner **before** he made his determination and issued his statutory notice of deficiency.

The genesis of the $4,995 difference in that one year is interesting. I noticed it in preparing the case for trial. I also noticed that in 1945 only $120 was deducted by the taxpayer for a year's rent, instead of $720 ($60 per month).

When the Commissioner was preparing for trial (see page 108a) he asked for the books, and I pointed this difference out to his Agent and suggested that he might find the answer in the disbursements shown on the books. The point is, that if the audit had been started promptly in 1947 instead of 1950, the accountant who prepared the return (one of those real estate, insurance, notary public and income tax returns prepared men) might have had his working papers available.

Reply to Argument.

I hope this Court will not be taken in by what might be expected of a team of pickpockets or confidence men. I refer to the story on page 5 of *Respondent's Brief in Opposition* now used in an attempt to justify the arbitrary use of the net worth method without any examination of the taxpayer's books and records and sources of income.

The Tax Court found no fact or reason supporting the use of the net worth method prior to the determination of the Commissioner. Ergo, the determination was arbitrary. The Tax Court Judge, with years of experience in the Office of the General Counsel of the Treasury, was not misled in this respect.

The practice in the Treasury Department is to assign a return to a Revenue Agent for *audit*, accompanied by a Special Agent who covers the possible fraud element (107a). A Deputy Collector works under entirely different superiors, and, as his title implies, usually is concerned only with the collection of a tax after assessment. At page 112a, the Deputy said, "* * * *I had nothing at all to do with this case.*"

The facts are that on April 17, 1947 (70a), the Revenue Agent and Special Agent visited the taxpayer, asked to see his books, and in the words of the *auditing* Agent under direct examination (100a):

> "At that time Mr. White said that Mr. Hawkins, who was his accountant at that period, was in Florida for a vacation and would be away for two weeks, and would we postpone the examination at that time so that Mr. Hawkins could be present. **We agreed to that.**"

Under cross-examination (106a) he stated that this request was normal, and that "arrangements were to be made for the examination."

But that is not all that happened on April 17, 1947. The Revenue Agent and the Special Agent obtained a sworn statement (71a) from the taxpayer bearing on his net worth, and also went with the taxpayer to his safe deposit box which they examined and made a list of his mortgages, deeds, &c. *It is submitted that they put this taxpayer on the net worth basis from the very first day.*

They disregarded the usual courtesy to which they had agreed, and without making "arrangements for the examination" the Special Agent accompanied by a Deputy Collector who had "nothing at all to do with the case," returned on May 5, 1947, and demanded the books, which they knew he had, and had to have or lose his license under the state law (also found as a fact by the Tax Court).

After that first day, when he agreed to make arrangements for an audit with the accountant on his return, the *auditing* Agent Friedman never asked for the books until shortly before December 11, 1950. **This is the first time the Commissioner saw the books.** The deficiency notice issued October 6, 1948 (5a).

The Special Agent and the Deputy Collector jostled the mark, then the auditing Agent picked his pocket. This is how they "laid the foundation" for the use of the net worth

basis (see p. 100a). I don't think the Tax Court was fooled. The taxpayer was put on the net worth basis from the first day, without rhyme or reason; and the Tax Court gave no reason for this basis **arising prior to the Commissioner's statutory determination.**

We again pray that *certiorari* be allowed.

Respectfully submitted,

HENRY D. O'CONNOR,
Attorney for Petitioner.

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IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1952.

No. 254.

CHARLES E. WHITE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

ON PETITION FOR A WRIT OF CERTORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Charles E. White respectfully represents:

In the petition for writ of certiorari denied on October 13, 1952, the grounds presented were predicated on the failure of the Commissioner to examine the books of the taxpayer and check his income *before* making a statutory determination of income tax deficiency. We concentrated on this point because it appeared to us that the Congress and the Courts had ordained that net income shall be computed in accordance with the method regularly employed in keeping the books of such taxpayer. "They can't do that to you," we said to the petitioner.

Other substantial grounds were available to the petitioner, *all questions of law argued in the Court of Appeals*, and are now urged, as follows:

1. The Commissioner had the burden of proving the taxpayer's net worth. In his answer filed in the Tax Court, the Commissioner pleaded the taxpayer's net worth (14a, et seq.). The Commissioner's proof was a statement listing taxpayer's assets less liabilities (printed at 160a), and was admitted in evidence over objection despite the fact that it is conceded that it includes mortgages at the face value without reduction for payments on account and also includes real estate actually sold under instalment agreements (see 136a). To prove the balance due on a mortgage, the Commissioner should have produced the debtors. He had sworn statements from them (132a), even before his deficiency determination and more than two years before the Tax Court hearing.

Taxpayer is now selling these mortgages to pay the tax, and the cold-eyed bankers will not take them at the face value,—they want a declaration of no set off from the mortgagors.

As a matter of law, it is submitted that the net worth statements were not admissible to support a claim for money when mortgages are included at face value. If a

taxpayer gave such a financial statement to a banker when borrowing, including mortgages at face value, he would be guilty of a crime. The taxpayer replied under oath to the Commissioner's answer, and set forth his actual net worth.

Prior to the case at bar, the Tax Court has consistently followed the rule that the allegations in the Commissioner's answer must be proved by him:

Pepsi Cola Co., 5 T. C. 190, 200;
Tennessee Consolidated Coal Co., 15 T. C. 424.

2. As a matter of law, there is no evidence here of any fraud. Further than that, there is no evidence that this man had any income not reported. On the fraud question, the Tax Court cited one case, which, like *all* reported fraud cases, recites *a factual course of chicanery* on the part of the taxpayer there to support the requirement that evidence of fraud must be "clear and convincing:" *M. Rea Gano*, 19 B. T. A. 518. Every fraud case tells *what* such taxpayer did to deceive the Commissioner and tells *where* he got the income he did not report.

The only fraud in this case is the Commissioner's inflated figures.

The taxpayer's sources of income were found as a fact, but it was *not* found that *any* source was understated in his tax returns.

Why even the negligence penalty of 5% requires proof by the Commissioner of some *specific act* of carelessness:

Wilson Bros. & Co. v. Comm. (C. C. A. 9), 124 F. 2d 606. Understatement of income (which we do not admit) is not affirmative proof of fraud under all the cases.

Wherefore, your petitioner prays your Honorable Court to grant rehearing of his petition for writ of certiorari, and upon such rehearing to grant the prayer of his petition.

CHARLES E. WHITE,
Petitioner.

By: HENRY D. O'CONNOR,
Attorney for Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that this petition for rehearing is presented in good faith and not for delay; and I further certify that it is restricted to the grounds: (1) which party had the burden of proving the net worth alleged in the Commissioner's answer, and (2) whether or not there was any evidence of fraud—be it clear, convincing or wholly nonexistent.

HENRY D. O'CONNOR,
Attorney for Petitioner.